ernment (Fdgs. 4, 5; R. 11, 13–15, 17). Respondent was granted adequate extensions of time, as provided in Article 9 of its contract (*infra*, p. 18). The court below held that by specifying a contract completion time of 120 days, the Government became obligated "to make performance within 120 days possible" (R. 19); that its failure to make performance possible within this time was a breach of contract; and that the Government "must respond in damages for the breach" (R. 19). We submit that the decision below is in direct conflict with *Crook Co.* v. *United States*, 270 U. S. 4, and *United States* v. *Rice*, 317 U. S. 61.[3]

In *Crook Co.* v. *United States*, 270 U. S. 4, Crook contracted with the Government to install heating systems in two buildings under construction. Completion by Crook of his work within the period specified in his contract was rendered impossible by delays in the construction of the buildings. This Court held that the delays were unavoidable so far as both Crook and the Government were concerned and that Crook could not recover damages in addition to the extension of time granted to him on account of such delays.

[3] See also *United States* v. *Blair*, 321 U. S. 730. The disposition of the court below to disregard the principles of the *Crook*, *Rice*, and *Blair* cases was also challenged by the Government in No. 701, this Term, *United States* v. *Henry Ericsson Company*, and No. 748, this Term, *United States* v. *B–W Construction Company*, both petitions for writs of certiorari denied March 4, 1946.

Thereafter, this Court, on the petition of the Government, granted certiorari in a similar case, *United States* v. *Rice*, 316 U. S. 653, "to review a judgment against the United States by the Court of Claims, 95 Ct. Cls. 84, interpreting a widely used standard form construction contract in a manner alleged to be in conflict with this Court's interpretation of an analogous contract" in the *Crook* case. *United States* v. *Rice*, 317 U. S. 61, 62. In that case, this Court held the Government not liable for damages resulting from the delay caused by necessary changes in plans and repeated the principle of the *Crook* case that "it was not to be expected that the Government should bind itself to a fixed time for the work to come to an end, and there is not a word in the instrument by which it did so, unless an undertaking contrary to what seems to us the implication is implied." *United States* v. *Rice*, 317 U. S. 61, 65; *Crook Co.* v. *United States*, 270 U. S. 4, 6.

The attempt of the court below (R. 18–20) to distinguish this case from the *Crook* and *Rice* cases is, it is submitted, baseless. That the delays in those cases may have been due to changes[*] required by the Government, which changes were specifically provided for in the contracts, would not affect the principle of the *Crook* case, stated by this Court to be that (270 U. S. at 6):

[*] That the delay in the *Crook* case was due to "changes", as assumed by the court below, is open to question. See 59 C. Cls. 593.

> The Government did fix the time very strictly for the contractor. It is contemplated that the contractor may be unknown, and he must satisfy the Government of his having the capital, experience, and ability to do the work. Much care is taken therefore to keep him up to the mark. Liquidated damages are fixed for his delays. But the only reference to delays on the Government side is in the agreement that if caused by its acts they will be regarded as unavoidable, which though probably inserted primarily for the contractor's benefit as a ground for extension of time, is not without a bearing on what the contract bound the Government to do.

Nor would it affect the principle of the *Rice* case that "contracts such as this do not bind the Government to have the property ready for work by a contractor at a particular time." 317 U. S. at 65. See also *Chouteau* v. *United States*, 95 U. S. 61.

Moreover, it would appear to be immaterial, from the standpoint of the application of those principles, whether the contractor whose work was delayed was delayed by the work of another contractor or by the work, as here, of the Government done on force account (Fdg. 4; R. 11–13), particularly where, as here, there was no fault on the part of the Government but, on the contrary, "the Government's representatives and operating force acted with great, if not unusual, diligence" (Fdg.

5; R. 17, 15).[5] As in the *Rice* case "Respondent was required to adjust its work to that of the general contractor, so that delay by the general contractor would necessarily delay respondent's work" (317 U. S. at 65), so the respondent in the instant case was required to adjust its work to "the paving of the runways and taxiways * * * the rough grading of the shoulders * * * by the Government" and knew that until that work was completed the site would not "be released to this Contractor for work under this contract." Section 5–2 of the specifications; Fdg. 2; R. 9–10; *infra,*

[5] The only fault attributed to the Government by the court below was the establishment of the 120-day period in the contract, which the court below described as a "mistaken calculation" (R. 17). Whether this is so is problematical in view of the contracting officer's finding that 120 days was "a reasonable time for completion of the contract under ordinary circumstances" and the court's own finding that "no evidence has been proffered that the facts were contrary to those found by the contracting officer" (Fdg. 4; R. 13–14). However, if the 120-day period was a miscalculation, it resulted from mutual mistake and not merely from that of the Government since the respondent, of course, agreed to it. Moreover, such agreement by respondent must be read in the light of Section 3–16 of the specifications (Fdg. 2; R. 9; *infra*, p. 19) which provides:

"It is understood and agreed that the Contractor has, by careful examination, satisfied himself as to the location of the work, the character, quality and quantity of the work to be performed and materials to be furnished, the character of the equipment and facilities needed preliminary to and during the prosecution of the work, the general and local conditions, and all other matters which can and in any way affect the work under this contract."

pp. 19–20. Cf. Section 3–25 of the specifications; Fdg. 2; R. 9; *infra*, p. 19.

A fair reading of the contract here involved imposes liability upon the Government for the delays here suffered by respondent only to the extent of requiring the Government to excuse respondent from performance within the original contract time. This Court so held in the *Rice* case, when it said (317 U. S. at 69) with respect to the delay that "the time necessary to perform the contract was equitably adjusted by extension, thereby relieving respondent of liquidated damages which could otherwise have been imposed. *Under the terms of the contract, it is entitled to no more.*" [Italics supplied.] Article 1 of the contract (*infra*, p. 17) fixed the time "very strictly" for performance by respondent. Cf. *Crook Co.* v. *United States*, 270 U. S. 4, 6. Article 9 (*infra*, pp. 17–19) provided that if respondent failed to complete the work within the time thus set, the Government was entitled to terminate the contract or to require the payment of liquidated damages. Neither in Article 1 nor in Article 9 is there to be found any express promise or any basis for implying a warranty by the Government as to the time within which performance could be completed, which would be the only basis on which the decision below could be supported. To the contrary, Article 9 expressly provides merely that the contractor shall not be liable for liquidated damages because of "acts of the Government," a provision which strongly suggests that the Gov-

ernment's liability is to be limited accordingly. Indeed, it is well settled that in the absence of an express agreement to the contrary a contractor is liable for breach of contract as a result of delay caused by even unanticipated difficulties. *Maryland Dredging Co.* v. *United States,* 241 U. S. 184; Restatement of Contracts, § 467; 6 Williston, *Contracts* (rev. ed., 1938), §1964. Obviously, if the contractor is liable to the owner for such delays, the owner is not liable to the contractor and cannot be regarded as having warranted to the contractor that such delays will not ensue. Cf. *Day* v. *United States,* 245 U. S. 159. The decision below, however, attempts precisely this—to turn respondent's duty to perform within 120 days into the Government's warranty that it would be able to do so. We submit accordingly that respondent, having had its time extended under Article 9 (Fdg. 4; R. 11–14) and having been paid the full contract price (Fdg. 3; R. 10), "is entitled to nothing more." *Crook Co.* v. *United States,* 270 U. S. 4, 7.

The court below considered Article 9 inapplicable because its proviso relates to extensions of time for delays due to "unforeseeable" causes while, according to the court below, the difficulties in erecting and stabilizing the runways were not "unforeseeable" but merely "unforeseen" (R. 17). In so holding, the court below disregarded the contracting officer's findings of fact that the causes of delay were "unforeseeable" (Fdg. 4;

11–14,[6] despite the Court's own finding that "no evidence has been proffered that the facts were contrary to those found by the contracting officer" (Fdg. 4; R. 14).[7] Not only the contracting officer,

[6] The contracting officer also used the term "unforeseen", but it is clear from his findings as a whole that he used it in the sense of "unforeseeable" as that term is used in Article 9 of the contract. In his findings of May 17, 1941, the contracting officer specifically stated that respondent was "delayed * * * due to excusable causes as contemplated by the contract provisions" and granted respondent an extension of 78 days "due to unforeseeable causes of delay beyond your control and without your fault or negligence." Compare the language of Article 9, *infra*, p. 18.

The contracting officer was not alone in using "unforeseen" in the sense of "unforeseeable" as that term is used in Article 9. The court below has not always been as meticulous in its distinctions between the two words as its opinion in the instant case (R. 17) would indicate. See *H. B. Nelson Construction Co.* v. *United States*, 87 Ct. Cls. 375, certiorari denied, 306 U. S. 661, in which the Court of Claims, in dealing with an "unforeseeable" clause such as that here involved (87 Ct. Cls. at 386), repeatedly referred to "an unforeseen cause of delay for which the contractor is not responsible under Article 9"; "unforeseen delays excusable under Article 9"; "an unforeseen cause of delay under Article 9". See 87 Ct. Cls. at 389–390.

[7] It is submitted that even had such evidence been proffered the contracting officer's findings of fact would have been conclusive in view of the provision in Article 9 that his findings of fact "shall be final and conclusive on the parties hereto, subject only to appeal, within 30 days, by the contractor to the head of the department concerned or his duly authorized representative, whose decision on such appeal as to the facts of delay and the extension of time for completing the work shall be final and conclusive on the

but also the respondent acted throughout on the assumption that the delays were such as came within the proviso to Article 9. Respondent complied with the procedure established by Article 9 for keeping the contracting officer notified with respect to delays (Fdg. 4; R. 10, 12) and it accepted the first extension of time granted by the contracting officer and thereafter applied for and accepted an additional extension (Fdg. 4; R. 10–14).[8] We submit that respondent, having had advantage of Article 9, cannot now complain that the delays were not within the contemplation of that Article.

2. The question presented is important. The large number of construction contracts entered into by the United States continue to present questions of liability for delay. While this Court, in the *Crook*, *Rice*, and *Blair* cases, *supra*, enunciated principles which, it is submitted, govern this case and require reversal of the judgment

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parties hereto". Cf. Article 15 (R. 7). *United States* v. *John McShain, Inc.*, 308 U. S. 512, 520; *Merrill-Ruckgaber Co.* v. *United States*, 241 U. S. 387, 393; *Plumley* v. *United States*, 226 U. S. 545, 547; *Ripley* v. *United States*, 223 U. S. 695, 704; *United States* v. *Gleason*, 175 U. S. 588; *Martinsburg & Potomac R. R. Co.* v. *March*, 114 U. S. 549, 553.

[8] If the delays were not within the contemplation of the proviso to Article 9, there was no authority in the contracting officer to grant the extensions and respondent would have been liable to the Government for liquidated damages in the amount of $15,700 (Fdgs. 3, 4; R. 10–12). *Maryland Dredging Co.* v. *United States*, 241 U. S. 184; Restatement of Contracts, § 467; 6 Williston, *Contracts* (rev. ed., 1938), § 1964.

below, the court below has shown a continued disposition, recognized by this Court in the *Rice* case, to disregard those principles. A further ruling by this Court as to their applicability is desirable.

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.

J. HOWARD MCGRATH,
Solicitor General.

MARCH 1946.

APPENDIX

CONTRACT

ARTICLE 1. * * * The work shall be commenced as soon as practicable, and shall be completed within one hundred twenty (120) calendar days from date of receipt of notice to proceed.

* * * * *

ARTICLE 9. *Delays—Damages.*—If the contractor refuses or fails to prosecute the work, or any separable part thereof, with such diligence as will insure its completion within the time specified in article 1, or any extension thereof, or fails to complete said work within such time, the Government may, by written notice to the contractor, terminate his right to proceed with the work or such part of the work as to which there has been delay. In such event the Government may take over the work and prosecute the same to completion, by contract or otherwise, and the contractor and his sureties shall be liable to the Government for any excess cost occasioned the Government thereby. If the contractor's right to proceed is so terminated, the Government may take possession of and utilize in completing the work such materials, appliances, and plant as may be on the site of the work and necessary therefor. If the Government does not terminate the right of the contractor to proceed, the contractor shall continue the work, in which event the actual damages for the delay will be impossible to determine and in lieu thereof the contractor shall pay to the

Government as fixed, agreed, and liquidated damages for each calendar day of delay until the work is completed or accepted the amount as set forth in the specifications or accompanying papers and the contractor and his sureties shall be liable for the amount thereof: Provided, That the right of the contractor to proceed shall not be terminated or the contractor charged with liquidated damages because of any delays in the completion of the work due to unforeseeable causes beyond the control and without the fault or negligence of the contractor, including, but not restricted to, acts of God, or of the public enemy, acts of the Government, acts of another contractor in the performance of a contract with the Government, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, and unusually severe weather or delays of subcontractors due to such causes, if the contractor shall within 10 days from the beginning of any such delay (unless the contracting officer, with the approval of the head of the department or his duly authorized representative, shall grant a further period of time prior to the date of final settlement of the contract) notify the contracting officer in writing of the causes of delay, who shall ascertain the facts and the extent of the delay and extend the time for completing the work when in his judgment the findings of fact justify such an extension, and his findings of fact thereon shall be final and conclusive on the parties hereto, subject only to appeal, within 30 days, by the contractor to the head of the department concerned or his duly authorized representative, whose decision on such appeal as to the facts of

delay and the extension of time for completing the work shall be final and conclusive on the parties hereto.

* * * * *

SPECIFICATIONS

3–16. *Knowledge of Conditions.*—It is understood and agreed that the Contractor has, by careful examination, satisfied himself as to the location of the work, the character, quality and quantity of the work to be performed and materials to be furnished, the character of the equipment and facilities needed preliminary to and during the prosecution of the work, the general and local conditions, and all other matters which can and in any way affect the work under this contract.

* * * * *

3–25. *Cooperation.*—The Contractor shall cooperate with other Contractors and Government agencies doing construction work at the site and shall employ such methods and means in executing his work so as not to interfere with or cause any interruption to the work being installed by such Government agencies or by any other Contractor or public utilities company. The Contractor shall execute his work in such a manner and serve notices in ample time as to afford the other Contractors and agencies operating on the site to coordinate their work with the work under this contract.

* * * * *

5–2. As the paving of the runways and taxiways is completed, the rough grading of the shoulders

will be performed by the Government, and sections so rough graded will be released to this Contractor for work under this contract.

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